INDEX

CITATIONS

In the

Supreme Court of the United States

OCTOBER TERM, 1965

No. 2

UNITED STATES OF AMERICA,
Petitioner

vs.

FRANK ROMANO AND JOHN OTTIANO,
Respondents

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the Court of Appeals is reported at 330 F.2d 566, and appears at pages 123-130 of the transcript of the Record.

JURISDICTION

The jurisdiction of this Court is based upon the provisions of 28 United States Code, Section 1254 (1). The Petition for a Writ of Certiorari was granted on March 15, 1965 (380 U.S. 941) *Cf.* (R-138).*

* References are to the Transcript filed by the Government.

QUESTION PRESENTED

Whether the presumptions established by Section 5601 (b) (1) and (4) of the Internal Revenue Code, as here applied, satisfy the requirements of the due process clause of the Fifth Amendment.

STATUTES INVOLVED

Section 5601 of the Internal Revenue Code of 1954 as added by 72 Stat. 1398-1400, 26 U.S.C. 5601 provides, in pertinent part as follows:

(a) OFFENSES:

Any person who —

(1) Unregistered stills

Has in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by 5179 (a); or

(8) Unlawful production of distilled spirits

Not being a distiller authorized by law to produce distilled spirits produces distilled spirits by distillation or any other process from any mash, wort, wash, or other material . . .

(b) PRESUMPTIONS:

(1) Unregistered stills

Whenever on trial for violation of sub-section (a) (1) the defendant is shown to have been at the site or place where and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant

shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury . . .

(4) Unlawful production of Distilled Spirits

Whenever on trial for violation of sub-section (a) (8) the defendant is shown to have been at the site or place where, and at the time when such distilled spirits were produced by distillation or any other process from mash, wort, wash or other material, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury . . .

STATEMENT

On October 10, 1960, Agents Mortimer Nadel and Samuel Sushman of the Alcohol and Tobacco Tax Division of the Internal Revenue Service, together with Officer Donald Harris of the Connecticut State Police, went to the site of the "Aspinook Mill" in Jewett City, Connecticut. The purpose of this visit was to attempt to verify certain information concerning an alleged violation of the revenue laws taking place on the premises.

"Aspinook Mill" is a large complex of industrial buildings covering a number of acres of land. Parts of the complex had been and were occupied by tenants. There was an entrance to the property; and, beyond the entrance, two roadways were available for access to all of the buildings. One of these roadways ran along the river that bordered the property on the west. The other ran toward the railroad tracks that bordered the property on the east. The northerly side of the mill was bordered by the river and by a hydro-electric spillway. The entrance gate was on the southerly side of the property.

The three agents proceeded along the easterly boundary of the property with Officer Harris of the State Police acting as the guide. There was a fence along this part of the property and as the three agents walked along the outside of the fence they came upon an aperture through which they gained entry into the "Aspinook Mill" property.

The intelligence available to the federal agents indicated that there was an illegal distilling apparatus located in the extreme northwesterly corner of the industrial complex previously described. After gaining entry through the hole in the fence, the three agents then proceeded, under the cover of darkness, through a series of buildings until they were in the the so-called paint shop area. This scouting expedition took place between 10:30 and 11:00 p.m. At this point, from a concealed position in the buildings, the agents could detect the odor of fermenting mash. The building in which they detected the odor of fermenting mash was located in the extreme northwest corner of the complex and all of its windows had been covered with some substance that prevented light from showing on the outside at night.

Earlier, other agents of the Alcohol Tax group set up an observation position on high ground across the river from the "Mill" site. Apparently all of the windows were not covered because Agent Shaw, using a high powered set of binoculars, made observations of the interior of the building through what was apparently a single unpainted or uncovered pane of glass. From these observations, Agent Shaw made an affidavit that there appeared to be equipment in the building that could be used for distilling purposes. On the basis of the observations made through the binoculars and the entry on the "Mill" premises on the night of October 10, two agents, Shaw and Sushman, prepared affidavits that were the basis for the issuance of a search warrant for the northwest corner building. The war-

rant was issued and directed the agents to search and seize specific items forthwith.

On October 13, 1960, at 7:30 a.m. a group of agents and officers of the Connecticut State Police went to the "Aspinook Mill" and entered the described premises. On the premises they found the defendant, Frank Romano, and the defendant, John Ottiano. They also found a large capacity still. The evidence indicated the still had been in operation for about three days. Ottiano had arrived at the premises in a pick-up truck about twenty minutes before the Federal agents broke into building 9A.

During the trial, it developed that the Government agents had found a large distilling apparatus on the premises. The Government offered evidence which showed that there were certain glass jars of a type distributed by a Connecticut representative of the Knox Glass Company found on the premises. The president of the distributor testified that he had sold jugs of this type to two men whom he identified as Frank Romano and Edward Romano. (R. 67-68) The witness also testified that they were operating a Ford pick-up with a rack body of the same type and year as that found on the still premises on the morning of the raid. Another witness testified that he was directed by his employer to deliver some truck loads of sugar to a location outside of Providence, Rhode Island. The person who met him drove away with the truck and returned about an hour and a half later with the truck empty. The time just to travel from Providence to Jewett City and back was estimated well in excess of this time. The type of sugar was 60 lb. bags of Domino Brand sugar. Neither of the government witnesses was able to state with certainty that the glass jugs or the empty or full sugar bags found in Jewett City were the same as those sold some time earlier. On the "still premises" the Government produced photographs of a commode and a

shield, apparently of plywood, segregating the lavatory from the rest of the premises.

Later, the Government produced a witness who indicated that at some indeterminate date in September, 1960, he saw the defendant, Ottiano, and the defendant, Edward Romano, in a building on the extreme southerly part of the industrial complex. The witness stated that these two men were looking for a piece of plywood and the commode. The witness stated that he called Providence to obtain permission to let them take it.

Edward Romano was the only defendant that took the stand and he denied having been in Jewett City, Connecticut, or at the "Aspinook Mill" at any time before October 13, 1960.

Thereafter, the Court made its charge on the elements of the offenses charged and the presumptions in Count One (R. 98-100) Count Two (R. 101-102) and Count Three (R. 103-109). The trial court never indicated that the presumptions were limited to Counts One and Two or to the defendants, Frank Romano and John Ottiano only. The Second Circuit reversed the convictions of Frank Romano and John Ottiano on Counts One and Two and affirmed the convictions of the other two defendants on Count Two and all defendants on Count Three, somehow concluding that the Court clearly distinguished between defendants in Count Two and made it clear that no presumptions applied to Count Three, this in the light of a specific exception taken by the defense. (R. 116, 118)

After the trial commenced, one defendant changed his plea, and another defendant was discharged by the Court at the conclusion of the case for the prosecution. The trial started on May 1, 1962, and ended on May 31, 1962.

Frank Romano and John Ottiano were found guilty of possession, custody and control of an unregistered still in Count One, all defendants were found guilty of production of distilled spirits in Count Two and conspiracy to produce distilled spirits in Count Three.

In the charge, the Court told the jury it was duty bound to follow the law as stated. (R. 91) In the beginning of the charge the Court charged on the presumption of innocense. (R. 92-93) In addition, the Court told the jury that evidence included admitted and stipulated facts, facts judicially noticed, and presumptions (R. 94) which "continues in effect until overcome or outweighed, but unless so outweighed the jury are bound to find in accordance with the presumption." (R. 95)

ARGUMENT

I.

The Statutory Inference Set Forth In 5601(b)(1) Violates The Fifth Amendment

There has been a decision in March, 1965, by this Court that tends to indicate that this statutory presumption should be declared constitutional, *United States* vs. *Gainey*, 380 U.S. 63 (1965). While *Gainey* does hold the statutory presumption constitutional, it does so by pointing out that as the presumption was used in the Court's charge in the middle district of Georgia, it was merely tantamount to an expression of existing rules of evidence. This case is fundamentally different in that regard.

The Government contends that it was the intent of Congress, in enacting the provisions of Section 5601 in 1958, to overrule the conclusions of this Court in *Bozza* vs. *United States*, 330 U.S. 160. In *Bozza*, this Court said that to establish the ele-

ments of "custody, possession, or control" there must be some affirmative evidence of activity tending to establish that conclusion. A lessee, rentor, caretaker, watchman, or lookout status, established by the evidence, might suffice. At the same time in *Bozza* the Court said actual participation in the production was not enough. The issue was not redefined in 5601(a)-(1) since the same words are used. The only function of the presumption, therefore, is to afford the opportunity to convict when your evidence is devoid of probative value to establish custody, possession or control.

Regardless of the circumstances of one's presence, presence alone being sufficient to convict, the prosecution's task under 5601(a)(1) is complete by showing:

1. A still or distilling apparatus set up.
2. No registration.
3. Presence of the Defendant.

At this stage, should the accused elect not to "explain such presence to the satisfaction of the jury" by taking the stand, the presumption would impose upon the accused a substantial danger. At the same time, it gives to the Government a simple conviction technique devoid of any danger at all. What, in this example, is the rational connection between the facts proved and the ultimate facts presumed?

Tot vs. *United States*, 319 U.S. 463 at 466.

What is the rational connection between presence and guilt? "It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him . . . The (Fifth Amendment) in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure

of the defendant . . . to be a witness shall not create any presumption against him."

Cf. Griffin vs. *California*, 380 U.S. 609;
Wilson vs. *United States*, 149 U.S. 60 at 66.

Is it not equally conceivable that a man could go to a place that he knows to be a distillery without any knowledge about the failure to have it registered in accordance with the law? Rather than meet the rational connection test established in *Tot* vs. *United States, supra*, this presumption permits the most irrational connection to the ultimate fact presumed. *Ibid.*

Finally, since section 5601(a) defines a number of offenses, by taking the stand to try to persuade the jury, an accused may find himself faced with the practical effect of giving testimony that will surely convict him of one of the alternatives available for prosecution. If this Court gives this presumption the broad definition that the Government urges, it will have effectively shifted the burden to the defendant to prove himself innocent.

II.

THE STATUTORY INFERENCE SET FORTH IN 5601(b)(4) IS VIOLATIVE OF FUNDAMENTAL FIFTH AMENDMENT GUARANTEES.

Section 5601(b)(4) permits the following evidence, and no other, to be produced to establish a prima facie case:

(a) No record of the defendant being an authorized distiller.

(b) Production of distilled spirits.

(c) Physical presence, when and where the spirits are being produced, of the defendant.

At this point, the prosecutor, with the aid of the presumption, will have established a prima facie case. He may rest. In the charge, the trial court must charge the jury under 5601(b)(4). The Court would, therefore, be permitted to charge:

> "Any person who not being a distiller authorized by law to produce distilled spirits by distillation or any other process violates 26 United States Code Section 5601(a)(8). Distilled spirits include ethanol, ethyl alcohol, spirits of wine and include brandy, whiskey, rum, gin and vodka. A distiller is a person who produces distilled spirits from any source or substance.
>
> "Was the building in which the still or distillation apparatus set up legally registered with the Secretary of the Treasury?
>
> "If you find that the defendant was present at a time when and a place where there was being produced distilled spirits unless the defendant explains, to your satisfaction, his presence, the law imposes upon the defendant a presumption that his presence is sufficient to authorize his conviction.
>
> "Evidence includes all facts which have been admitted or stipulated, all facts and events judicially noticed, and all presumptions stated in these instructions."

It is not so important to point out that these precise words were used in a much more lengthy charge in this case. What is important is that except for a paragraph about reasonable doubt, a few more sentences defining what a distiller is and an instruction that the verdict must be unanimous, this charge could be correct if the *Gainey* case *supra* is dispositive of the issue. The example is plainly a "reductio ad absurdum" analogy. Does it, however, violate the test of *Wilson* vs. *United States,* 149 U.S. 60? Does 5601(b)(4), insofar as that pre-

sumption may be used in still cases, repeal 18 U.S.C., Section 3481? If an accused declines to explain his presence, is that, with all of the majesty and dignity accorded the bench by the twelve laymen in the box, an alternative method of reverting to "the inquisitorial system of criminal justice", *Murphy* vs. *Waterfront Commission of New York Harbor,* 378 U.S. 52 at 55.

If we were to paraphrase the language of *Malloy* vs. *Hogan,* 378 U.S. 1, it would read:

> "It would be 'incongruous' to have different standards determine the validity of a claim of privilege . . . depending on whether the claim was (based upon an alcohol tax provision of the United States Code, or some other federal criminal violation) . . . the same standard must determine whether an accused silence is justified."
>
> *Ibid* at 11.

This Court has condemned the practice of comment, in *Griffin* vs. *California,* 380 U.S. 609, noting in footnote 3 at page 612 that Connecticut permits comment by the judge. In deciding *Griffin* this Court said comment on the failure of an accused to testify violates the Fifth Amendment. Is a charge such as made here under 5601(b)(4) less than comment?

III.

The Charge Was Constitutionally Inadequate Even If The Gainey Standard Is Adopted.

In the *Gainey* case, *supra,* at page 70, this Court observed that the trial court pointed out, precisely, when making the charge upon the statutory presumption, that the presumption was not mandatory. The trial court in this case made no such observation when charging on Count I. (*Cf.* R. 100) In

Count II similarly, there is no language of explanation that the presumption was not mandatory. (R. 102) In fact, by inference, the presumption attached to an aider and abettor since the definition of aiding and abetting followed immediately the charge under 5601(b)(4). Thus, the presence of A — the agent or associate of B, is presumptive of the guilt of A & B. The charge is absolutely devoid of any clarifying or distinguishing language. If *Gainey* is to be the rule, therefore, the charge must meet the test established by the charge in *Gainey*. This charge does not.

CONCLUSION

For the reasons stated, the convictions were tainted by reason of the violation of the guarantees afforded by the Fifth Amendment to all the accused.

W. PAUL FLYNN,
Counsel for the Respondents

September 23, 1965

CERTIFICATION

This is to certify that five copies of the foregoing Brief were mailed to the United States Attorney for the District of Connecticut, and five copies of the foregoing brief were mailed to the Solicitor General of the United States.

W. PAUL FLYNN,
Counsel.